Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No. 79-1698

Aristides Matsis, Appellant,

vs.

Rose Matsis, Appellee.

CERTIORARI FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

By: Appellant pro se
2860 Broadway
New York New York
10025

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OPINIONS BELOW

The Family Court proffered no opinion on any of the federal questions raised below by appellant. No opinion was rendered by the Appellate Division of the Supreme Court,Second Department, the order of the Family Court was affirmed. Appellants motion for leave to appeal to the Court of Appeals,the highest tribunal in the state of New York was dismissed sua sponte on the ground no substantial constitutional question was directly involved.Appendix A thru E

STATEMENT OF JURISDICTION

Appellant seeks review of the judgement entered on February 20,1980 by the New York State Court of Appeals denying him review of the judgements of the courts below, of the federal questions raised.

CONSTITUTIONAL AND STATUTORY PROVISIONS CONFERRING JURISDICTION

This Court has jurisdiction over the instant matter pursuant to 28 United States Code 1257(3) which states: Final judgements or decrees rendered by the highest court of a state in which decision could be had,may be reviewed by the Supreme Court as follows: (3) By writ of certiorari where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution or where any...right,privilege or immunity is specially set up or claimed under the Constitution.

QUESTIONS PRESENTED FOR REVIEW

Child support statutes of New York State that base a parents obligation soley on marital status and gender in exempting mothers as a class,require a father to reduce his standard of living in order to maintain his wifes exemption and prior standard of living,apply a presumption of means or ability rule discriminately to father and exempt mothers, and allow a court to ignore the facts and circumstances of the case in its decision,and preempt and intrude on the parties right to fix the terms and conditions of their marriage contract,are an deprival of appellants constitutionally guaranteed rights to privacy,contract,due process and equal protection. The statutes abrogate the ninth,tenth and fourteenth amendments to the constitution and are outside the states power and delegated authority.

Appellant seeks a judgement from this Court if appeal is granted extending child support obligations to both parents,enforcement of his implied contract and a holding that support statutes must be applied gender neutral.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

NINTH AMENDMENT OF THE UNITED STATES CONSTITUTION,Constitution of the United States of America,Jayson,1972,p.1257. The enumeration in the constitution of certain rights,shall not be construed to deny or disparage others retained by the People.

TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION,Constitution of the United States of America,Jayson,1972,p.1263. The powers not delegated to the United States by the constitution,nor prohibited by it to the States are reserved to the States respectively.

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION,Constitution of the United States of America,Jayson,1972,p.1303. All persons born or naturalized in the United States and subject to the jurisdiction thereof,are citizens of the United States and the State wherein they reside.No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States;no shall any State deprive any person of life,liberty,or property, without due process of law;nor deny any person within its jurisdiction the equal protection of the laws.

ARTICLE SIX OF THE UNITED STATES CONSTITUTION,Constitution of the United States of America,Jayson,1972,p.18. This constitution,and all the laws of the United States which shall be made in pursuance thereof;and all the treaties made or which shall be made,under the authority of the United States,shall be the Supreme Law of the Land;and the judges in every state shall bound thereby,anything in the constitution or laws of any state to the contrary notwithstanding.

GENERAL OBLIGATIONS LAW 5-311,Family Law Bender pamphlet edition,1978,Misc.143. Certain agreements between husband and

wife void: A husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife or to relieve the wife of liability to support her husband provided that she is possessed of sufficient means and he is incapable of supporting himself and is or is likely to become a public charge.

FAMILY COURT ACT 513,McKinneys Consolidated Laws of New York.29a,p.439. Obligation of Parents: Each parent of a child born out of wedlock is liable for the necessary support and education of the child and for the childs funeral expenses.

FAMILY COURT ACT 413.McKinneys Consolidated Laws of New York.29a,p.236. Fathers duty to support child: The father of a child under the age of twenty-one years is chargeable with the support of his child and,if possessed of sufficient means or able to earn such means,may be required to pay for such childs support a fair and reasonable sum according to his means,as the court may determine.

FAMILY COURT ACT 437,McKinneys Consolidated Laws of New York.29a,p.325. Presumption of sufficient means: A respondent is prima facie presumed in a hearing under section 433 and section 454 to have sufficient means to support his wife and children under the age of 21 years.

FAMILY COURT ACT 438,McKinneys Consolidated Laws cf New York.29a.p.327. Counsel fees: In any proceeding under this article by a wife or former wife,against her husband,or former husband,including proceedings for herself and her children,or by a person on behalf of children only,

or at any hearing to modify or enforce an order entered in that proceeding or a proceeding by a husband or former husband to modify a decree of divorce,separation,or annulment,including an appeal under article ten the court may allow counsel fees at any stage of the proceeding to the attorney representing the wife, former wife or person on behalf of children.

STATEMENT OF THE CASE

After dissolution of the parties marriage contract the trial court referred the issue of child support and counsel fees to the Family Court of Rockland County, which entered an order of support and counsel fees which exempted appellee-petioner from any obligation whatsoever.The trial court ignored evidence of appellees history of employment and the fact that appellant-respondent was not possessed of sufficient means with which to discharge the terms of the order and support himself,citing as authority a presumption of means rule(appendix F).

The trial court was bound by statutes that exempted mothers of legitimate children from support and counsel fee liability(F CA 413,437,438 and GOL 5-311).Also disregarded was the parties implicit agreement to share the support obligations and the fourteenth amendments commands which are an integral part of every state court judgement(Article 6,Constitution). The courts judgement left after support payments appellant $70 per month for his own expenses, and the children with a reduced measure of support as compared with a greater sum if both parents were required

by the state to provide child support.

Appellant took an appeal on the grounds that his right to due process were denied in that the state substituted judgement by legislative fiat,lieu of a fair and impartial hearing and determination on the merits, as guaranteed by the 14th. amendment.The statutes command a directed judgement against fathers while exempting mothers in contravention of the equal protection clause of the 14th.amendment,and that the presumptions of means and ability statutes(FCA 413,437) deny appellant due process in that they permit a court to render judgements inconsistent with the facts of the case,make the hearing a sham.Implict and silent parties in the case were the innocent and powerless children who were discriminated against because they were legitimate and could as a matter of law enjoy support only from their father,while illegitimate childern can receive support from both their parents(FCA 513).The appellate court affirmed the orders and had no opinion on the federal questions raised.

FEDERAL QUESTIONS RAISED BELOW

In the trial court,Family Court of Rockland,on March 18,1979, a month before decision was rendered,appellant submitted a Judicial Notice of Law in support of his claim that he was entitled to apportionment of support and counsel fees with his ex wife.Appellant cited the following; Page 1,Orr vs.Orr,440 U.S.___,a landmark decision ruling that all support laws that discriminate on the basis of sex are unconstitutional pursuant to USCA 14,apportionment of child support is constitutionally mandated,standard of living rule is unconstitutional if applied discrimin-

ately against males,that the right to contract into marriage and set the terms and conditions of that contract is reserved to the people and the state by enacting and enforceing statutes that preclude and preempt that private right is a violation of constitutional rights.The State must enforce the marriage contract.

Page 2 Under DRL 236,237 and 240,FCA 412, 413 and 438 wives(mothers) are not required to support their children,the laws are a denial of equal protection of the law and unconstitutional under USCA 14.
Page 3 This court must apportion the support of the children equally between the parents,including but not limited to counsel fees,consistent with Orr.

Page 4. For the court to direct the defendant to maintain the standard of living of his family at the expense of reducing his own is unconstitutional under USCA 14.

Page 5. The parties right to enter into the contract of marriage is guaranteed by the constitution and to set the terms and conditions of that contractual obligation is part of that guarantee.
The state by enacting and enforceing statutes that limit and impair that right to contract is a violation of USCA 9.By precluding and preempting that right and making it against public policy his constitutional rights are violated.

Page 6. The state is mandated by Article 1,section 10(1) not to pass any laws that impair the obligation of contracts.By making marriage contracts against public policy(GOL 5-311)the state has impaired de-

fendants right to contract.The states have a constitutional mandate to enforce his marriage contract.
The state by setting the terms and conditions of defendants marriage contract through the matrimonial laws,did so without constitutional jurisdiction,the setting of those terms and conditions is reserved to the people,(USCA 9 and 14) and not within the police powers delegated to the states by USCA 10 and 14.

Page 7. The constitution reserves to the states certain police powers,...the state cannot ask a private party to perform a public function delegated to the states, to wit guaranteeing that the ex spouse will not go on public assistance,....a function of the state.

The order and decision of the trial court reflect no opinion on the federal questions raised or that it was moved by those arguments or passed on their validity.

On July 24,1979,appellant submitted to the Appellate Division,Second Department a brief on appeal of the orders of the court below which again asserted the federal questions.

Page 7. Since the orders discriminate on every point against appellant who is male, (liability for support,capability and the means of the parties)by exempting appellee from any liability,the orders are inconsistent with Orr.

Page 8. The state has enacted and enforces several laws that prohibit citizens from contracting to share the burdens and benefits of the contract,to fix the terms and conditions by agreement before,during or after dissolution.....and impresses up-

on a husband the sole liability for support and maintenance of his wife,or ex wife and children,FCA 412,413,DRL 32(1)(2).

Page 9. The individuals right to contract is reserved to the people,and guaranteed by USCA 9 and 14.

Page 10. The state by rewarding the party who breached the contract of marriage, with awards of alimony,counsel fees and exempting that party from their duty to contribute toward the support of their children,insures that the contract can be breached with impunity and harmless from damages. The most effective remedy to breach of the marriage contract is the certainty of no reward.

The states have a constitutional mandate inherent in the police powers delegated to them to provide for the general welfare,...public assistance,a state may not relinquish that duty or transfer it to an individual,...requiring him to perform a public function,...as it does in directing an ex husband to guarantee that his ex wife and children will not become public charges.

Page 11. The state directed appellant in addition to discharging his child support obligation to also discharge his ex wifes share,without any provision for prospective recoupment at the time appellee was possessed of the means to repay appellant.

The support order directs appellant to... maintain his children in the style they were accustomed to,which leaves appellant with $50 per month for maintaining himself in the standard he was accustomed to, absolutely impossible. It is a violation

of the equal protection clause in USCA 14 to direct a citizen(appellant)to reduce his own standard of living in order to maintain his families prior standard.

Page 12. The court(state)passed judgement on the fairness of the award to the ex-wife and children,while electing not to determine the fairness to the husband(appellant) denying him his constitutional rights to equal protection and due process under USCA 14.

(The)Court explained that every respondent is presumed to be possessed of sufficent means to pay whatever the court determines is fair and proper support irrespective of the weight of unrebutted evidence to the contrary....this rule allowed the court to lawfully disregard ... due process and equal protection rights.

Page 13. Given the equal obligation of the parties for the support of the children, both the parties are in effect respondents under FCA 437,cloaked with the presumption of sufficient means. The states application of the rule discriminately against appellant only,exempting appellee, is prohibited to the states that it is an abridgement of appellants rights to equal protection under USCA 14.All presumptions by their very nature are suspect,in that they are an abridgement of due process rights.

Nor as the court suggests is the rule a proxy relieving the court from making findings consistent with the facts and evidence,presented in open court....and to support conclusions that are not made on the evidence.

Page 16. It is gratuitous for the state to assume that all ex wives cannot contribute toward their own and their childrens support,since the assumption is self fulfilling ,in that requiring the exhusband(father)to bear the sole burden, precludes the necessity for the ex-wife to become self sufficient.

Wherefore;appellant respectfully requests that this court grant him the following relief;

1. An amendment of the support order dated April 18,1979,directing that each of the parties are liable toward contributing...to the support of the children.

2. An amendment of both counsel fee orders dated May 28,1979,deleting respondent and adding petitioner as the payor.

3. A declaratory judgement that all support statutes not gender neutral are unconstitutional,void and unenforceable.

4. A declaratory judgement that the state must enforce marriage contracts which supercede state laws controlling.

5. A declaratory judgement that the standard of living and presumption of means rule are void and unenforceable.

On December 17,1979 the appellate court affirmed the three orders unanimously withe no opinion or passing on the federal questions raised.

In the Court of Appeals the states highest court on January 22,1980 appellant filed a motion for leave to appeal pursuant to

CPLR 5601.The court denied appellants motion on the grounds no substantial constitutional question was directly involved.

THE QUESTION PRESENTED IS NOVEL,SUBSTANTIAL,OF CONTINUING IMPORTANCE TO APPELLANT AND THE NATIONAL FABRIC OF SOCIETY IN THE PRESENT AND FUTURE

The federal question raised herein are substantial in that the effect powerless children,who must be protected by society. The subject statutes discriminate against all the parties and place an onerous burden on society, that a fair statutory scheme would not.When child support goes uncollected or is insuffcient,it is society that must pick up the burden.Over 75% of child support goes uncollected to 4,000,000 families.(Divorce,Child Custody and Child Support,Bureau of Census,June 1979,series P-23,no.84,page 3).The problem is not limited to the state of New York but is of national scope as the statistics cited show. The root cause of the effect is the gross unfairness of discriminatory support statutes that exempt a parent from any support liability soley on marital status and gender. What is the moral responsibility of the parents becomes the societies,when in frustration an unfairly burdened father throws up his hands and abandons his obligation to his children.

If the child support burden were apportioned as a matter of law between both the parents the problem for society would largely disappear, to the benefit of all.

As a practical matter children can enjoy a greater measure of support from both parents than they can from one. The statutory schemes challenged here penalize innocent children by limiting the support they can receive to their father alone,and exempt a mother from any obligation,who is rewarded by her freedom from the burden and the necessity to become self sufficient and a contributor toward the best interests of their children.

Illegitimate children in New York enjoy support from both parents as a matter of public policy(FCA 513)while legitimate children as a matter of law can only receive crumbs from the table that a father alone and over burdened can provide, resulting in a lower standard of living and contrary to the best interests of the children. The states policy encourages illegitimacy for reasons that escape me,why should a father marry the mother of his children knowing that he must shoulder the mothers obligation in addition to his own.

In Gomez v.Perez,409 U.S.535,538,the Court said: Once a state posits a judicially enforceable right on behalf of childrden to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not(or has) married its mother.

The dicta above support appellants contentions that his children should not be denied support from both their parents just because they married.

In reality the petitioner-beneficiaries in the support proceeding were the children who certainly had a right to an equal measure of support from each of their parents,without regard as to whether or not they are legitimate or illegitamate Levy v.Louisiana,391 U.S.68,Glona v. American Guarantee Co.,391 U.S.73)or to the gender of their parents Orr vs.Orr, 440 U.S.____,1979.

The child support award was made on appellants ability and exempted appellee from the same yardstick applied to appellant,irrespective of her proven ability to contribute toward the support of her children,in violation of equal protection under the law guarantees under the 14th.amendment,and due process in that the exemption was accomplished before a hearing by legislative fiat and not on the merits pursuant to FCA 413 and 437 a respondent as a matter of law can only be a father(male) unless he is dead or incapacitated(FCA 414),highly unlikely since the median life span of a male in the United States is 60 years,long after the procreative years nature has allotted him.

The state policy of entering an order of support on a ability basis upon a finding that a respondent lacks the means to discharge an order directing him to support himself and his family in the style they were accustomed to,unfairly discriminates between the rich and poor father, by mandating a fictional measure of award based on the courts hypothetical fixing of what he might earn if he tried a little harder and had good fortune to meet

the courts supposed abilities of the father which as a matter of law are predetermined by legislative fiat(FCA 413) and not on the facts of the case a contravention of his rights to a hearing pursuant to state law(FCA 433)and due process guarantees under the 14th.amendment.The same presumption does not apply as a matter of law to mothers charged with the support of their children under state law(FCA 414)unconstitutional under the 14th.amendment.

A affluent father is measured by his actual means in fixing the amount of support which does not require extraordinary effort on his part to satisfy,and not speculative as is the order entered against a poor father based on a legislative assumption arrived at not in the court room but in legislative chambers in the capital,the most onerous of due process deprivation imaginable.

If the poor father fails to live up to the order of support based on his hypothetical abilities,he suffers exposure to contempt of court and incarceration proceedings(FCA 454) most choose to flee the jurisdiction than suffer such a arbitrary and unfair fate.Few among us ever reach our potential ability,must we be penalized? The statutory scheme presents a father with a stacked deck in derogation of his right to a fair and impartial hearing and disposition.The states posture posits a sink or swim alternative for a hapless father.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person

of his property.The purpose of this requirement is not only to insure abstract fair play,its purpose more particuliarly is to protect his use and possession of property from arbitrary encroachment,to minimize substantially unfair or mistaken deprivations of property,a danger that is especially great when the state seizes goods simply upon the application of and for the benefit of a private party.Feuentes v.Shevin,407 U.S.80-81.

As long as a presumption is not unreasonable and is not conclusive of the rights of the person against whom raised, it does not violate the due process clause.Legislative fiat may not take the place of fact,however,in the determination of issues involving life,liberty or property,and a statute creating a presumption which is entirely arbitrary and which operated to deny a fair opportunity to repel it or to present facts pertinent to ones defense is void.Manley v. Georgia,279 U.S.1,5;Bailey v.Alabama,219 U.S.219,233.

A statute which treated a breach of contract to labor as prima facie evidence to defraud....was found to be constitutionally defective because the trial court was permitted to disregard evidence rationally bearing ....and to decide upon evidince pertaining to an unrelated breach of contract,with the consequence that an adequate hearing upon fraud was not afforded.Bailey v.Alabama,219 U.S.219,233.

The state of New York did not meet the dicta set forth by this court as to presumptions and a fair and impartial hearing.

The rights of appellant and his children were seriously impaired by the statutes and their application in that a fair and impartial hearing untainted by legislative presumptions that operated conclusively to bring about a finding contrary to the facts and circumstances of the case, resulting in a sham hearing that produced perverse results. Appellant would not have had the sole financial burden of child support had the trial court not been bound by statutory presumptions.

Since the state requires a hearing as a matter of policy no additional burden accrues upon the state or the parties by a determination on the merits at trial rather than the present policy,by legislative fiat.(FCA 433). Orr v.Orr,99 S.Ct. 1113. the Court said: in such circumstances,not even an administrative convenience rationale exsists to justify operating by generalization.

Nor can the state justify or recognize special wards such as mothers entitled to a greater degree of protection than that accorded others. In University of California Regents v.Bakke,57 L.Ed 2d 774,the Court said: It is too late to augue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. There is a measure of inequity in forcing innocent persons in respondents position to bear the burdens of redressing grievances not of thier making.(Id at 776).

In order to justify the use of a(support) classification,a state must show that its purpose or interest is both constitutionally permissable and substantial and that its use of the classification is necessary...to the accomplishment of the purpose or the safegarding of its interest.Id at 781,also Poe v.Ullman,367 U.S.497,522,539, to 545.

Preferring members of one group soley on the basis of race or ethnic origin(gender,marital status) is discrimination for its own sake,which the 14th.amendment forbids,Bakke at 782.

And Bakke continued: We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial,legislative or administrative findings of constitutional or statutory violation...also the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons... Without such findings of constitutional or statutory violations it cannot be said that the Government has any greater interest in helping one individual than in refraining from harming another.Thus the Government has no compelling justification for inflicting such harm.Bakke at 782-783. Neither the legislature or the judiciary of the state of New York have ever made any findings that mothers or women as a class have suffered any constitutional or statutory deprivations nor the trial court in the instant case, consistent with the dicta in Bakke,how could it then justify harming appellant and his children so that appellee may

enjoy a beneficial exemption from child support obligations,doubly so when in fact she did not need such solicitude.

The state of New York saddled appellant with personal responsibility to protect appellee from supposed injustices to which society,not he,will submit her to in the marketplace and without a judicial determination that she has in fact been injured or requires such special consideration to justify depriving appellant of his guaranteed rights to equal protection and due process under the law.

Motherhood or wife is a role stereotype similiar to that which was held impermissable in Califano v.Webster,430 U.S. 313,317 and in Orr v.Orr 99 S.Ct.1113. Continuing the Orr Court said: Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the proper place of women and their need for special protection.Id at 1113. Since only the female gender can classify as a mother or wife all of the classifications are the same and treated under the law with strict scrutiny and consistent with dicta concernining gender classifications held unconstitutional,previously,in Orr,Stanton and Califano.

Appellants marriage contract and the terms and conditions thereof in allocating the support obligations between the parties by mutual agreement is prohibited and impaired by state laws that make such an agreement against public policy, (GOL 5-311) and preempt or preclude the parties right under the 9th.amendment to make thier own contract and agreements without state interference or intrusion.

an invasion of privacy.Griswold v.Connecticutt,381 U.S.488,491,492. The state interest is not harmed in any way if it permitted and enforced contracts before, during or after marriage since if the resulting agreement was unconscionable or injurious to the individuals or the public,under exsisting state law it reserves the right not to enforce,or remedy any wrongs resulting. To deny all individuals their inalienable right to contract into marriage(Meyer v.Nebraska,390 U.S.1262)and the obligations accruing,on the ground some one individual might make an unconscionable agreement is state action operating by broad generalizations impermissably under the 14th.amendment.

The framers of the constitution incorporated checks and balances between the three levels of government and the guarantee to every individual to be free from an anonymous bureaucracy directing his life by remote control from some state capital. Nor has history demonstrated that public official are better suited,qualified or possess a greater wisdom than the peoples they can represent as a whole but not permitted to do so in a manner that invades the rights and privacy constitutionally guaranteed by the 9th.amendment,to each citizen individually.

As a practical matter the largest undertaking by individuals is the contract of marriage, a tremendous and ongoing venture where the state unlike every other civil contract does not permit an individual to sit down with his counsel and arrive at a agreement suitable to the interests and compatable with the obligations of the parties. The prospect of non-

enforcement and prohibition by the state of appellants express contract had a chilling effect in the free election of his right to exercise that privilege,no contract under these adverse circumstances can be freely entered into,thus the impairment.

In the instant case a comparison of Schesinger,419 U.S.498,and Webster,430 U.S. 313,to Wiesenfeld,420 U.S.636 and Goldfarb,430 U.S.199,establishes that this Court will not accept a mere assertion of the states benign intent as a justification for denying an individuals constitutional rights.

Given the states present monopoly in dissolution of marriage,as a practical matter if the state in the exercise of its monopoly abuses the individual rights of litigants that franchise should be given back to the people where it belongs. No offcial body can love another individuals issue to the degree of its creator. Nor is a settlement upon dissolution,under the gun of state policy,commanding one parent to be the sole provider of child support,be said,one which was freely entered into not under duress,such state intrusion is gratutious and unconstitutional. An unconstitutional application of the law is sufficient of itself to warrant review by this Court.Turner v.Fouche,396 U.S.346.

Under the common law and state law a party guilty of misconduct may not recieve alimony(DRL 170,236)appellee was such a party and the state rewarded her misconduct with an exemption from child support and counsel fees liability which far and away exceeded any alimony the court may

have awarded,that exemption in the form of a reward demonstrated the state policy of permitting and condoning the breach by a guilty party of the marriage contract,which the state policy is supposed to discourage,the application of state court judgements in the appellants case violated the prohibition of Article 1, section 10(1) of the constitution,forbiding the states from passing any laws impairing the obligation of contracts. The most effective guarantee that a marriage contract will be faithfully observed is the certainity of no reward upon a breach.

The ultimate abuse was the states directing appellant to pay appellees exhorbitant counsel fees in the procurement of her divorce for which as a matter of law she is entitled to irrespective of her misconduct in the breach of the marriage obligation,adding insult to injury,and a further impairment under Article 1,section 10(1).

To pay for the reward,the state granted appellee for her misconduct,appellant was directed to provide 93% of his income to appellee and pay $4,800 of her counsel fees an economic punishment having no basis in any moral or social law,forcing appellant to live on $70 per month,standing equal protection and equity on its head.

Regulating private contracts is not within the scope of police powers mandated to the states under the 10th.amendment,which are limited to the general welfare and not as in this case to private remedies that do not affect the public at all,in any event since the 9th.amendment has reserved the right to fix the terms and conditions of the marriage contract to the individual the state cannot enact laws that pre-

empt or preclude the private fundemental right to decide the obligations of that contract.The police power of the legislature extends to the protection of lives,limbs,health,comfort and quiet of all persons,and protection of all property within the state.In re Slaughter House Cases,83 U.S.36.

In Munn v.State of Illinois,94 U.S.113, this Court said: A social compact by which the whole people covenant with each citizen and each citizen with the whole people,that all shall be governed by certain laws for the common good,does not confer powers upon the whole people to contractual rights which are purely and exclusively private.

This Court said in Carey v.Population Services Interns,97 S.Ct.2010: Right in personal privacy includes interest in independence in making certain kinds of important decisions,among decisions that an individual may make without unjustified government interference are personal decisions relative to marriage.

Also in Louis K.Legget Co.v.Balderidge, 278,U.S.105,followed in Pratter v.Lascoff,185 N.E.716,this Court said: State legislation under police power may violate constitutional rights only when it substantially relates to public health, safety,morals or general welfare.Other than police power the states are powerless under the constitutional mandate of the 10th.amendment.

Constitutional imperatives of the equal protection clause must have priority over the comfortable convienience of the status quo.Williams v.Illinois,399 U.S. 235.

Chief Justice Burger dissenting in Stanley v.Illinois,405 U.S.663,said: Quite apart from the religious or quasi religious connotations marriage has and has historically enjoyed...it is in law an essentially contractual relationship.

Appellant under the subject state schemes was presumed to have sufficient means to provide support of the childrden in any amount directed,upon overcoming that presumption successfully the court determined the award based on his presumed abilities,a distinction based on wealth or the lack of it stuck down by this Court in Tate v.Short,401 U.S. 395,appellee as a matter of law could not be directed to contribute toward the support of the children based on her presumed abilities,having been exempted by legislative fiat rather than as the constitution commands on the merits after a hearing,thereby depriving appellant of his property without due process of law through exemption of appellee of her equal obligation,which increased appellants obligation by that amount which appellee should have contributed.

In Carrington v.Rash,380 U.S.96, this Court said: By the mere fact of appellants gender his obligation was a certainty,not requiring any proof from the state,by a presumption at law and not in fact any defense was futile since the presumption was conclusive,incapable of being overcome by proof of the most positive character.

Proceeding by presumption is always cheaper and easier than individualized determination,but when...the procedure forecloses the determative issues...when it explicitly disdains present realities ... it needlessly risks running roughshod over the important interests of both par-

ent and child.It therefore cannot stand Stanley v.Illinois,405 U.S.656-657.It resorts on presuming rather than proving ....solely because it is more convienient to presume than to prove.Under the due process clause that advantage is insufficient to justify refusing a father a(fair)hearing when the issue at stake is....his family.Id at 658. The only purpose of the hearing held in appellants case was to determine how much he should pay and not to make any thing but a pretense at inquiring whether the best interests of the children would be better served if both parents were directed to provide for the children.

Appellant was denied recoupment for any expenditures over and above or on the behalf of his wifes(appellees), equal obligation to support her children,which he made at a time she did not have the means to contribute.The silence of the order of support on the issue barred prospective recoupment at the time appellee did become possessed of the means to repay appellant,a common law right that is equitable justice to both parents and the children without unconstitutionally placing the sole burden on one party. The New York Court of Appeals has endorsed the principle in part.Launier v. Launier,237 N.Y.357,365,143 N.E.219,221.

This Court in Application by Gault, 387 U.S.1 ,the doctrine that children as weel as adults have rights under the 14th. amendment,and the interests of the state is to insure that thier right to support is secured in a just and fair manner consistent with the mandates of the constitution and the Bill of Rights.

In Jiminez v.Weinberger,417 U.S.628,this Court held that illegitimate children have a constitutional right to support equal to that accorded legitimate children, given the fact that illegitimate children in New York have a statutory right to support from both parents(FCA 513), legitimate children should enjoy that same right,consistent with Jimenez,children are children regardless of thier legitimacy or lack of it,and are members of the same statutory classification seeking the same benefits,and must be treated the same.

Given the public policy of protecting the best interests of the child,those interests should be the measure of any statutory scheme benefiting them and not any pecuniary interests the parents may have in minimizing or eliminating their child support obligation,by seeking special solicitude from the state by reason of thier gender or marital status.

When government legislates and acts either on the basis of a suspect classification or with regard to a fundemental interest ,the traditional standard of equal protection review is abandoned and the Court exercises a strict scrutiny, government must demonstrate a high degree of need on its part,and apparently little or no presumption favoring the classification is to be expected.(Constitution of the United States,Jayson,1972 at 1474). This case is just such a controversy having suspect classifications and fundemental interests,intertwined together,compelling strict scrutiny from this Court. The issues here concern classification by gender and marital status and deprivation of fundemental rights to due

process,equal protection and privacy.

The other phase of active review of classifications holds that when certain fundemental liberties and rights are involved,government classifications which affect them must be justified by a showing of compelling interest necessitating the classification and by a showing that the distinctions are necessary to further the purpose.The effect of the test is to deny to legislative judgements the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.Kramer v.Union Free School District,395 U.S.621,627.

It should not make any difference to the state whether one or both parents support children,and in fact the statutes at issue here exempting mothers,in fact impair that purpose by imposing a burden on a father compelling him to reduce his standard of living to the point he is likely to become a public charge,or alternatively abandon his children to the public dole,or go uncollected,over 75% does in fact go uncollected nationaly(Divorce Child Custody and Child Support,Bureau of Census,June 1979,series P-23,no.84,page 3) and forceing children to reduced standards of living by virtue of the statutory exemption of thier mother from contributing to thier well being.The state policy is contrary to the best interests of the state,children and the parents and this Court could well remedy the problem by extending child support obligations to both parents by voiding the classification,father,in the statutes.

Appellant as well as society as a whole have a stake in the outcome of this case if decided for or against him. If this court reviews this case and decides in favor of extending child support obligations to appellee(mothers) his overall obligation would conceiveably be reduced by appellees contributions presently and in the future since child support is a continuing obligation,and the state would benefit by the likelyhood that appellant and members of his class would not become public charges or the children.Appellee and the children would enjoy a higher standard of living by her entry into the job market as a result of her new statutory burden,resulting in income they never had due to the schemes motivation of having mothers remain protected at home,relying on the fathers resources,already strained by maintaining two households where he once had one.

If this Court denies review the status quo will be maintained along with the attendant problems society as a whole must pay for,uncollected support or insufficient support must be made up by public programs which are Federal funds in part,making New York problems the burden of the nation(Aid to Dependant Children) which is unfair to the rest of the country which played no part in the mismanagement of this states policies. Respect for the states support judgements has suffered untold damage,by its policy of imposing unreasonable child support obligations without the opportunity to fairly adjudicate their propriety in an impartial forum and manner.The discrimination of the statutes also cause more subtle and pervasive injury to all the parties,by the statutes application and

enforcement,men,women,and children in New York are trapped in the traditional gender roles which the statutes reflect. My daughter is shaped by the role stereotype of women-mother-aid, my son by the classic,male-father-provider.In this regard,the distinction not only denigrates each womans sense of her self and psychologically regulates her to a proper place, it disrupts the free and mature development of women as a whole and limits the untapped contribution they can make to society given the chance through state encouragement instead of repression via archaic matrimonial laws.

Since child support is a ongoing and continuing obligation the questions presented are likely to recur not only to the parties here but to each of the parties coming before the matrimonial courts in the state, and they also have an interest in the outcome of this case,which goes beyond the personalities here. The questions raised therefore are substantial,warranting a decision by this Court.Super Tire Engineering Co.v.McCorkle, 416,U.S.115.The New York courts have in effect by failing to squarely resolve the issues presented have passed the buck to this Court,and that buck stops here, as President Truman aptly put it.

Since 1960,64,349,000 children ranging in age from 1 to 18 years old were born in this nation(Stastical Abstract of U.S. 1979,100th.edition,table# 80) all of them entitled to support that is equitable to them and their parents,under statutes consistent with the mandates of the constitution,the class is substantial in that

by sheer size they approximate 27% of the total population and any improvement in thier status must come from a determination from this Court that they are entitled to support from both of thier parents.That dicta will have a compounded effect in that the nations judges will be more inclined to secure those rights and parents to accept them by the awesome prestige and respect this Court has always commanded.

Recently this Court decided a case that affected a much smaller class of litigants,putative fathers being denied by statute the right to contest adoption proceedings.Caban v.Mohammed,99 S.Ct.1760. Justice Stevens in dissent said:...This is a ....case that should have no effect on the typical adoption proceeding, indeed,I suspect that it will affect only a tiny fraction of the cases covered by the statutes that now must be rewritten. The instant case affects a much greater class of litigants and for that reason along with the others,should be granted certiorari.

The pervasive nature and scope of the issues and statutes and the national importance of guidance from this court on what constitutes a workable statutory scheme that balances the rights of the parties with the state interest,requires immediate resolution by this Court imperative.

Given the fact that all the federal questions were properly raised below and that the questions are substantial, were never decided by this Court before,this squarely presented opportunity to clarify the constitutional issues is a rare and compelling challenge in the area of law balancing the interests and relations

of state and citizen,solomonlike.This Court has spoken on alimony in Orr,counsel fees in Childs, and must now speak on child support and parental right to privacy in that area, in this case.

CONCLUSION

The questions presented in this petition are substantial,novel and of great public importance,concern the doctrine that implicit in every state statute and judgement,the commands of the constitution must be met.Plenary consideration by this Court,with briefs on the merits and oral argument are necessary for thier resolution.

Respectfully
submitted;

Appellant pro se

At a term of the Family Court of the State of New York,held in and for the County of Rockland on April 18,1979

Present:
Hon.:Alfred J.Weiner

Rose Matsis, Petitioner,
vs.
Aristides Matsis, Respondent.

Docket #R-1-78

ORDER

This matter having been brought before the Court on the date of entry hereof, and after examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony in relation thereto,it is ORDERED:

Accordingly,after consideration of all the facts and circumstances,the Court finds that the respondent is capable of contributing to the support of his two children,in the sum of $225 per week, to be allocated $112.50 per child.Payment is to commence on the next regular payment date.

ENTER:
HON: Alfred J.Weiner
J.F.C.,

At a term of the Family Court of the State of New York held in and for the County of Rockland on May 28,1979

PRESENT:
HON.: Alfred J.Weiner

Rose Matsis, Petitioner,
vs.
Aristides Matsis,Respondent.

Docket:R-1-78
F-376-78

ORDER

This matter having been brought before the Court on the date of entry hereof,and

After examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony in relation thereto; it is

ORDERED: Fair and proper counsel fees are hereby fixed in the sum of $3,000.00 together with disbursements in the sum of $281.15.Respondent is to pay the total sum directly to the petitioners attorney, within fourty five (45) days of the date of this decision.

Respondents cross motion is in all respects denied.

ENTER:

Hon: Alfred J.Weiner
J.F.C.

At a term of the Family Court of the State of New York held in and for the County of Rockland on May 28,1979

PRESENT:
HON: Alfred J.Weiner

Rose Matsis, Petitioner,
vs.
Aristides Matsis,Respondent.

Docket:F-376-76
R-1-78

ORDER

This matter having been brought before the Court on the date of entry hereof,and

After examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony in relation thereto; it is

ORDERED: Fair and proper counsel fees are hereby fixed in the sum of $500.00,together with disbursements in the sum of $22.38 Respondent to pay the total sum of $522.38 directly to the petitioners attorney,within fourty-five(45) days of the date of this decision.

The respondents motion to dismiss is in all respects denied.

ENTER:
HON:

Alfred J.Weiner
J.F.C.

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 17,1979

Hon: James D.Hopkins,Justice Presiding
Hon: Vito J.Titone,
Hon: Frank A.Gulotta, Associate Justices
Hon: John P.Cohalan,Jr.

Rose Matsis, Respondent,

vs.

Aristides Matsis,Appellant.

Order on Appeals from orders

In the above entitled cause,the above named Aristides Matsis,respondent in the court below,having appealed to this court from three orders of the Family Court,Rockland County,one dated April 18,1979 and two dated May 28,1979(said appeals having been consolidated by an order of this court dated August 22,1979);and the said appeals having been submitted by Aristides Matsis,appellant pro se,submitted by David M.Klein Esq.,of counsel for respondent, and submitted by Robert J.Schack Esq.of counsel for intervenor pro se,and due deliberation having been had thereon;and upon this courts decision slip heretofore filed and made a part hereof,it is

ORDERED: that the orders appealed from are hereby unanimously affirmed,with one bill of $50 costs and disbursements payable to respondent.

ENTER: Irving N.Selkin
Clerk of the Appellate Division

James D.Hopkins,J.P.
Vito J.Titone
Frank A.Gulotta
John P.Cohalan,Jr. J.J.

____AD2d ____ S-December 4,1979

2237 E
2238 E
2239 E

In the Matter of Rose Matsis respondent v. Aristides Matsis,appellant.

Aristides Matsis,New York N.Y.appellant pro se.

Klein and Klein,Suffern N.Y.(David M.Klein of counsel),for respondent.

Robert Abrams,Attorney General,New York, N.Y.(Robert J.Schack and George D.Zuckerman of counsel),intervenor pro se(see CPLR 1012b).

Three orders of the Family Court,Rockland County(Weiner,J.),one dated April 18,1979 and two dated May 28,1979,affirmed,with one bill of $50 costs and disbursements payable to respondent. No opinion.

HOPKINS,J.P.,TITONE,GULOTTA and COHALAN,JJ concur.

December 17,1979 IN RE MATSIS v MATSIS
2237E,2238E,2239E

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court,held at Court of Appeals Hall in the City of Albany on the twentieth day of February A.D.1980

PRESENT:Hon.Lawrence H.Cooke,Chief Judge

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2 Mo. No. 210 SSD 18

Rose Matsis, Respondent,

vs.

Aristides Matsis, Appellant.

The appellant having filed a notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED,that the appeal be and the same hereby is dismissed without costs,by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W.Bellacosa
Clerk of the Court

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

ROSE MATSIS, petitioner,

DECISION

-against- Docket# R-1-78

ARISTIDES MATSIS, Respondent.

WEINER,J.

This proceeding is a Supreme Court referral to establish support for the parties two infant children ages 14 and 15,who are in the custody of the petitioner.

The petitioner has been unemployed since July of 1978.She was previously employed for approximately one year at a gross salary of $225.00 per week.Petitioner estimated current monthly needs for herself and two children to be in the approximate sum of $1,853.93.

The respondent is the president and sole shareholder of a corporation which owns and operates a restaurant.Respondent states that he is not receiving any income from this restaurant.Prior to 1974,respondent owned a second restaurant,the premises to which he now leases to a third party.He claims that the $1,040.00 rental income that he receives per month,pursuant to his lease,is his sole income.

In addition,the respondent,through another corporation,holds a lease which produces an income of approximately $10,000 per annum.However the expenses were claimed by respondent to exceed income.

Respondents monthly personal expenses are in the approximate sum of $1,090.00 which includes payment of the mortgage on the marital residence in the sum of $552.93.

The matrimonial residence of the parties which is currently occupied by petitioner and the children,is listed for sale at the price of $130,000.The home has an in ground pool,a sauna in the basement and is a spacious,contemporary home.The mortgage balance is only $28,000.When the parties were living together,they had hired an interior decorator and furnished the home expensively.They frequently entertained in their home at that time.

After the marital breakup,the respondent continued to pay expenses on the marital home,including the mortgage of $552,93 per month,utilities of approximately $300.00 per month and telephone expenses of approximately $45.00 per month.

A husbands assertion of the extent of his income is disregarded if evidence of a life style on a grander scale is presented to the court,and the court is not bound to accept the statements in tax returns as preclusive evidence of pecuniary resources.Accordingly,an unexplained severe reduction in income and a disposition of capitol which is not unsatisfactorily accounted for,is not taken as the true nature and extent of the husbands means.There is also statutory authority for not giving complete credence to a husbands proof of his means in that a respondent in a hearing in Family Court is prima facie presumed to have sufficient means to support his wife and minor children.(New York Civil Practice,Zett,Edmonds,Schwartz,page 28-23).

Accordingly,after careful consideration of all the facts and circumstances,the Court finds that the respondent is capable of contributing to the support of his two children,in the sum of $225.00 per week,to be allocated $112.50 per child.Payment is to commence on the next regular payment date.

The clerk of the court is directed to enter an order in accordance herewith.

Alfred J.Weiner
Judge of Family Court

Dated: New City N.Y.
April 18,1979

To: Klein & Klein Esq.
One Lafayette Ave.
Suffern New York

Mr.Aristides Matsis
2860 Broadway
New York N.Y.10025

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

ROSE MATSIS, Petitioner,

-against-

ARISTIDES MATSIS, Respondent.

DECISION
Do.#R-1-78

WEINER,J.

A motion has been made before this Court on the issue of counsel fees,after referral from the Rockland County Supreme Court.

Petitioners attorney has supplemented his request with an affidavit which delineates the nature and extent of the legal services rendered on behalf of his client.A fee in the sum of $10,470.00 has been requested,together with disbursements in the sum of $281.15.

Respondent has opposed petitioners attorneys application,and has cross moved for an award of counsel fees.

An award of counsel fees is discretionary with the court(Family Court Act,Domestic Relations Law Section 237) It is not a mere arithmetical computation,there are many factors that enter into such an exercise of discretion.

Orr v.Orr,(N.Y.L.J.,March 7,1979,page 2) requires that those statutes dealing with the issue of counsel fees be read to be gender neutral.

The means of the parties are proper considerations.(Kann v.Kann,38 AD2d 545;Metz

v.Metz,40 AD2d 680;Wood v.Wood 21 AD2d 627.)

The attorneys skill,competence and his standing and reputation in the profession are important considerations,as well as the nature and amount of work involved (Di Benedetto v.Di Benedetto,284 AD 982).

Prior awards of counsel fees,if any,must be considered by the court in determining whether counsel fees are warranted for services subsequently rendered.(Reimer v.Reimer,31 AD2d 482.) Furthermore, any sums advanced by the petitioner in payment of a legal fee is also a proper consideration.(Ross v.Ross,47 AD2d 866; Press v.Press,49 AD2d 603.)

Regardless of the most conscientious and necessary legal representation by the petitioners attorney,a fee can only be awarded only if the court finds the respondent has the ability to pay it,(Goldfarb v.Goldfarb,34 AD2d 774),and even then it can be awarded only in accordance with his means(Wood v.Wood,supra)

Accordingly fair and proper counsel fees are hereby fixed in the sum of $3,000.00 together with disbursements in the sum of $281.15.Respondent is to pay the total sum of $3,281.15 directly to the petitioners attorney,within fourty five(45) days of the date of this decision.

Respondents cross motion is,in all respects denied.

The clerk of this court is hereby instructed to prepare an order in accordance with this decision.

Alfred J.Weiner

J.F.C.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

ROSE MATSIS, Petitioner,

-against- DECISION

ARISTIDES MATSIS, Respondent. F-376-76

WEINER,J.

An application has been made to this court for counsel fees,rendered in connection with petitioners application for an order of protection under the Family Court Act,Section 446,and an ensuing appeal

Petitioners attorney has supplemented his request made in open court with an affidavit which delineates the nature and extent of the legal services rendered on behalf of his client. A fee in the sum of $2,490.00 has been requested,together with disbursements in the sum of $22.38.

Respondent has opposed petitioners attorneys application by motion to dismiss.

An award of counsel fees is discretionary with the court(Family Court Act,Section 438).It is not a mere arithmetical computation,there are many factors that enter into such an excercise of discretion.

Orr v.Orr(N.Y.L.J.,March 7,1979 page 2) requires those statutes dealing with the issue of counsel fees be read to be gender neutral.

Section 237 of the Domestic Relations Law permits the courts to award counsel fees

as justice requires,and has frequently been interpreted to allow counsel fee award to a wife in defending an appeal. (Fox v.Fox,263 N.Y.68,Tacchino v.Tacchino,47 AD2d 830,Miraldi v.Miraldi,37 AD 2d842,In re Schloss,NYLJ,May 11,1978, N.Y.County Supreme Court,page 11).

The means of all parties are proper considerations.(Kann v.Kann,38 AD2d 545; Metz v.Metz,40 AD2d 680;Wood v.Wood,21 AD2d 627).

The attorneys skill,competence and his standing and reputation are important consiserations,as well as the nature and amount of work involved.(Di Benedetto v. Di Benedetto,284 AD 982).The necessity and the merits of the proceeding are also among the factors to be considered. (Salk v.Salk,57 AD2d 519).

Prior awards of counsel fees,if any,must be considered by the court in determining whether counsel fees are warranted for services subsequently rendered.(Reimer v. Reimer,31 AD2d 482).Furthermore,any sums advanced by the petitioner in payment of a legal fee is also a proper consideration.(Ross v.Ross,47 AD2d 866;Press v.Press 49 AD2d 603).

Regardless of the most conscientious and necessary legal representation by the petitioners attorney,a fee can be awarded only if the court finds the respondent has the ability to pay it,(Goldfarb v. Goldfarb,34 AD2d 774),and even then it can be awarded only in accordance with his means,(Wood v.Wood,supra).

Accordingly,fair and proper counsel fees are hereby fixed in the sum of $500.00, together with disbursements in the sum of

$23.38.Respondent is to pay the total sum of $522.38 directly to the petitioners attorney,within fourty five(45) days of the date of this decision.

The respondents motion to dismiss is, in all respects denied.

The clerk of the court is hereby instructed to prepare an order in accordance with this Decision.

Alfred J.Weiner

Dated: May 28,1979 J.F.C.